



May 21, 2001

Mr. Joe De Los Santos
Walsh, Anderson, Brown, Schulze & Aldridge
P.O. Box 460606
San Antonio, Texas 78246-0606

OR2001-2097

Dear Mr. De Los Santos:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147485.

The Hays Consolidated Independent School District (the "school district"), which you represent, received a request for information "relating to the construction, repair, renovation and/or remodeling of Tom Green Elementary School located at 5059 Old Goforth Road, Kyle, Texas," including, but not limited to, four separate categories of information. You state that the requestor was given an opportunity to review and inspect the minutes of the school board, which were requested in item four of the request. You claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The school district must meet both prongs of this test for information to be excepted under 552.103(a).

You state that on September 16, 1998, the school district filed a lawsuit in the Hays County 22nd Judicial District Court against QIC Systems, L.L.C. ("QIC") and that the lawsuit is still pending. You have submitted a copy of the school district's Original Petition in that case as Exhibit A. Thus, we find that litigation was pending at the time of the request.

You also state that the school district brought suit against QIC for construction/renovation work it performed for the school district on the Tom Green Elementary School, which is located at 1301 Old Goforth Road, Buda, Texas. You state that the information the requestor is seeking is directly related to the central issues being litigated in the lawsuit, namely, whether the renovations/construction done by QIC on the Tom Green Elementary Building breached any duties owed by QIC to the school district. Based on this representation and our review of the submitted documents, we find that they are related to the pending litigation.

We note, however, that once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In this case, it appears that some of the submitted documents, which you have numbered as AG-001 through AG-427, have already been obtained by the opposing party to the litigation. Therefore, AG-001 through AG-427 must be released to the requestor.

We next address the documents that you have numbered as AG-428 through AG-468, which do not appear to have been obtained by all parties in the litigation. Based on your representation that litigation is pending and that the submitted documents relate to that litigation, we conclude that you may withhold the documents numbered AG-428 through AG-468 under section 552.103 of the Government Code, except as discussed below with regard to information subject to section 552.022 of the Government Code.²

Section 552.022 of the Government Code makes certain information expressly public. Such information is “not excepted from required disclosure under [chapter 552 of the Act] unless [it is] expressly confidential under other law.” Gov’t Code § 552.022(a). The requested information includes two completed reports prepared by consulting experts that fall within the scope of section 552.022(a)(1). These section 552.022 documents, which are marked AG-428 through AG-456 and AG-464 through AG-468, must be released to the requestor, unless they are “expressly confidential under other law.”

Sections 552.103, 552.107(1) and 552.111 are discretionary exceptions that do not constitute other law for purposes of section 552.022. *See* Open Records Decisions Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)); 551 (1990) (governmental body may waive section 552.103); 473 (1987) (governmental body may waive section 552.111). Thus, the school district may not withhold the section 552.022 documents under any of these three exceptions.

You also argue that the responsive information may be withheld under the consulting expert privilege, which is found in Rule 192.3 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the section 552.022 information is confidential under Rule 192.3.

A party to litigation is not required to disclose the identity, mental impressions, and opinions of consulting experts. *See* Tex. R. Civ. P. 192.3(e). The submitted documents reveal the identity, mental impressions, and opinions of consulting experts. Therefore, you must withhold from disclosure the documents marked as AG-428 through AG-456 and AG-464 through AG-468 pursuant to Rule 192.3(e). *See In re City of Georgetown*, 2001 WL 123933 at *11.

²In light of our conclusion under section 552.103, we need not address your other claims for the information not subject to section 552.022(a) of the Government Code. And, again, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

To summarize: You may not withhold the documents marked as AG-001 through AG-427 under section 552.103 because that information appears to have been obtained by the opposing party to the pending litigation. Because you raise no other exceptions for that information, it must be released to the requestor. On the other hand, you may withhold the documents marked AG-457 through AG-463 under section 552.103, and you must withhold the documents marked AG-428 through AG-456 and AG-464 through AG-468 under Rule 192.3(e) of the Texas Rules of Civil Procedure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).


If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen P. Agan", written over the typed name.

Stephen P. Agan
Assistant Attorney General
Open Records Division

SPA/seg

Ref: ID# 147485

Encl. Submitted documents

cc: Ms. Anne White
525 Skyline Summit Vista
Wimberly, Texas 78676
(w/o enclosures)